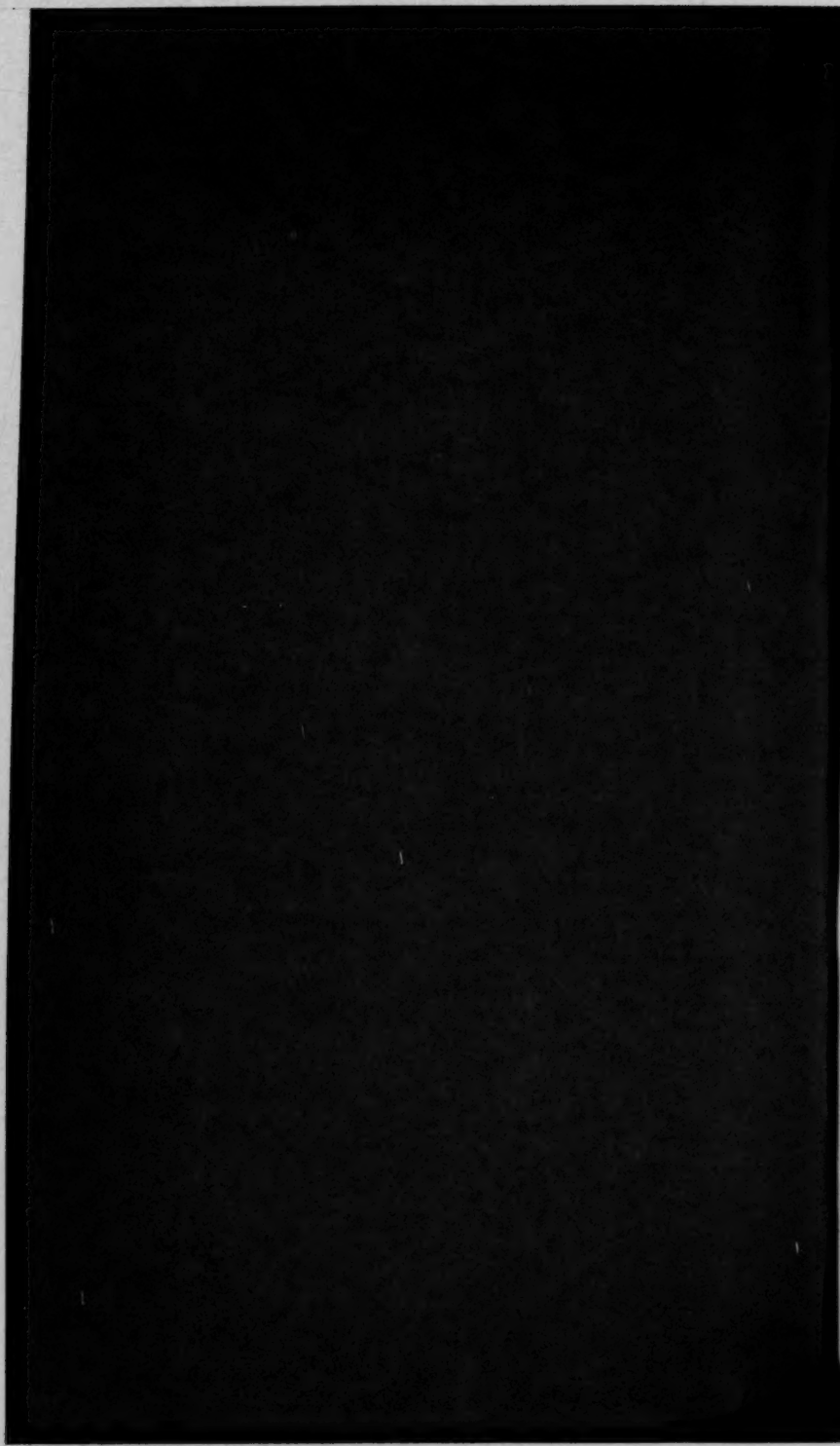

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INTRODUCTION

I. The factual setting

ralism Education.

In the next few months, this Court will be called upon to make historic decisions in the areas of state aid to nonpublic education, the outcome of which will critically affect the course of all public and private education for the balance of this century; and which will finally determine whether—and to what extent—the several states may constitutionally use public funds to preserve and reinforce this country's historic commitment to pluralism in education.

Scope of n-Catholic pport.

Although Catholic Church interests may to date have been the most vocal and visible in focusing attention on the plight of nonpublic eduction, particularly at the secondary level, this should not overshadow the fact that many diverse groups are concerned with the survival of this nation's pluralistic system of nonpublic education. These groups include all segments of private and independent secondary school interests—both sectarian and nonsectarian,—governmental agencies and elected representatives charged with furnishing free public education, and lay leaders in business, finance, labor and professional circles who have accurately appraised the financial crisis facing nonpublic education today.[1]

---

1. See the report of the blue ribbon committee of civic and business leaders on the financial crisis of the parochial school system in one major urban area, Philadelphia, and the catastrophic effect of its collapse on the already near-bankrupt School District of Philadelphia, *The Report of the Archdiocesan Advisory Committee on the Financial Crisis of Catholic Schools in Philadelphia and Surrounding Counties*, (John T. Gurash, Chairman, Philadelphia, 1972), a copy of which was attached to the brief of Intervenor-Defendant, Pennsylvania Association of Independent Schools, in the second appeal in *Lemon v. Kurtzman*, No. 71-1470, heard by this Court in the October Term, 1972. See also Exhibit B, section 3, pp. 55-59 herein.

Furthermore, there are in Pennsylvania, as elsewhere in the country, a host of sectarian schools, in addition to Catholic ones, that are encompassed by the term "nonpublic" schools. They are as varied as the wide range of our ethnic and religious heritage, including such religious groups as the Society of Friends (Quakers), Lutheran, Presbyterian, Episcopalian, Methodist, Jewish, and many others.

This broad based support for aid to nonpublic education is specifically evidenced by the variety of agencies and organizations which, in this Pennsylvania case alone, have filed amicus or supporting briefs urging the Court to uphold the Pennsylvania Parent Reimbursement Act:

¶ The Office of the Solicitor General of the United States of America—on behalf of the Executive Branch of the United States Government.

¶ The City of Philadelphia in its own right and on behalf of the financially beleaguered School District of the City of Philadelphia.

¶ The National Association of Independent Schools.[2]

¶ The Pennsylvania Association of Independent Schools.[3]

---

2. The National Association of Independent Schools, Inc. ("NAIS") is a Massachusetts corporation whose membership comprises approximately 768 independent schools engaged in primary and secondary education in 43 states of the United States, including 56 schools in the Commonwealth of Pennsylvania. Its membership also includes 27 regional school associations, one of which is the Pennsylvania Association of Independent Schools (see footnote 3, *infra*).

3. The Pennsylvania Association of Independent Schools ("PAIS") is a non-profit corporation organized and existing under the laws of Pennsylvania as an association concerned with the interests of its member schools in elementary and secondary education in this Commonwealth.

Its membership consists of 94 elementary and secondary schools, both private and church related, located throughout the Commonwealth, and for all practical purposes it represents almost all of the independent schools in this state.

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¶ The Benjamin Banneker Free School—a predominantly black secular school in a ghetto area of Philadelphia. (See the amicus brief filed in the Court below, a copy of which is attached hereto as Exhibit A).

Contribution of independent education.

While the number of pupils enrolled in private or independent schools is significantly less than the number in the Catholic parochial system, the independent schools have made and continue to make an extraordinary contribution to the national interest by educating large numbers of high quality, highly motivated leaders in business, the professions and public service.[4]

Scholarship program.

Furthermore, these independent schools have received widespread and well deserved public recognition for their scholarship programs, particularly to disadvantaged black students.[5]

All PAIS member schools admit all qualified students without regard to race, color, creed, or national origin.

All elementary and secondary member schools of the Association are accredited either by the Pennsylvania Association of Private Academic Schools or by the Middle States Association of Colleges and Secondary Schools and as such qualify to furnish education to Pennsylvania students under the provisions of the Pennsylvania Compulsory School Attendance Law.

PAIS was a party in interest in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

4. See Lxhibit B, *infra*.

5. "*Minority Group Survey—1971 and 1972*" published by NAIS. During the academic year of 1971-72, a survey was sent to all members of NAIS. 730 responded to this survey (or 95.8%) and stated that they have open enrollment policies (100% responded yes).

1) Number of minority students for the academic year 1971-72.

1. 9,627 blacks, an increase of 26.3% over the year 1969-70, and a 158% increase over the last 6 years.

2. Total number of minority students was 12,977, or 5.5% of the total enrollment in the schools.

2) Total financial aid given to students (with the exception of aid to faculty children) was $29,416,455.00. The total number of students receiving aid was 25,292, or 10% of all the students.

However, without some form of continuing public assistance, these scholarship programs, except in a handful of elite, heavily endowed private secondary schools, will inevitably collapse. Moreover and more tragically, many financially hard-pressed schools will also disappear, and when this happens we will have lost a priceless heritage that can never be regained.

The harsh fact the Court and society as a whole must recognize is that today, nonpublic education just cannot survive without substantial public assistance (—either in some form of aid to parents such as tax credit or tuition reimbursement, or to the schools themselves for non-ideological purposes—) because of the present pressure of inflation and competition from the ever-spiraling costs of teachers' salaries and benefits in the public school system. These costs continue to escalate in our public schools, due in large measure to the highly organized teacher groups and unions,[6] many of whom also vigorously oppose aid to nonpublic education.[7]

Note 5—*Continued*

3) Scholarships for minority students: $9,766,875.00 was given for financial aid, or 33.2% of the total amount of financial aid given. The number of minority students receiving aid was 5,830 students, or 23% of all scholarship students.

4) 1 out of 10 students receive aid, but 50% of minority students receive aid.

6. Some of these groups have shown that they will go to almost any extreme to gain their desired goals, including, as we have witnessed in Philadelphia, an open and notorious flouting of the law by the Union leadership and rank and file of Philadelphia Federation of Teachers who refused to obey a court injunction enjoining a crippling eight week strike in the public schools. Meanwhile, two of their leaders were jailed for contempt of court and each day hundreds of school teachers were arrested for violating a court order enjoining mass picketing and violence.

7. See, for instance, *Federal Support of Public Education*, Resolution C 21—Adopted in July 1972 by legislation specifically of the National Education Association, an independent, voluntary organization available to all professional teachers:

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II. Background of the legal setting

Finally, by way of introduction, we think it may be helpful to put the legal issues affecting the many forms of aid to nonpublic education in proper historical perspective, as this Court begins to focus in the weeks and months ahead on such critical issues as the validity of public funds for:

¶ *Mandated Services*—i.e., Testing, record keeping, etc. *Arthur Levitt et al. v. Committee for Public Education and Religious Liberty* (October Term, 1972, Nos. 72-269, 72-270, 72-271).

¶ *Non-Ideological Aid*—such as health and safety grants for repair and maintenance of nonpublic schools in certified low income areas. *Nyquist et al. v. Committee for Public Education and Religious Liberty* (October Term, 1972, Nos. 72-791 and 72-753).

"The National Education Association seeks general federal support for the whole of public elementary and secondary education. It believes that federal monies must be expended solely for public education. It seeks federal support in line with the following principles:

A. The federal share of the costs of public elementary and secondary education must be at least one-third.

B. Federal funds must be allocated without federal control for expenditure and be sub-allocated by state education agencies.

C. The amount of aid must be generally predictable for long range planning and specifically predictable for year to year planning.

D. Present programs of specific aid must be expanded and improved by consolidation and simplification of administration.

E. Public funded services for non-public school students must be strictly limited to medical and dental care, public welfare programs, school lunch and milk programs, and public safety services such as fire and police protection, which are budgeted and administered through the appropriate public agency.

F. Federal legislation must comply with civil rights statutes, be consistent with the constitutional provision

¶ *Partial Tuition Reimbursement to Parents*—either by:

(i) direct payment to parents for a portion of tuition incurred. *Sloan v. Lemon, Crouter v. Lemon* (October Term, 1972, Nos. 72-429 and 72-620).

(ii) tax credit for tuition payments. *Nyquist v. Committee for Public Education and Religious Liberty* (October Term, 1972, Nos. 72-694, 72-753, 72-791 and 72-929).

Any discussion of the legal principles involved must also focus on the critical issues that the various Justices have felt are persuasive or controlling in their final decisions on whether those who challenge state programs have met their heavy burden of establishing that the act complained of violates any one of the three-fold tests which this Court has laid down in order for a state program to be declared unconstitutional:

¶ that the primary *purpose* of the legislation is to advance religion; or

¶ that the primary *effect* advances religion; or

¶ that the statutory scheme involves undue entanglement between church and state.

Note 7—*(Continued)*

respecting an establishment of religion, and provide for judicial review as to its constitutionality.

The Association will oppose any bill which includes provisions in federal legislation to provide funds, goods, or services related to the instructional process for nonpublic school students."

On the other hand, the City of Philadelphia on its own behalf and on behalf of the School District of Philadelphia favors aid to nonpublic education and has requested reversal of the lower court's decision in this case. See Brief of the City of Philadelphia, Amicus Curiae filed on the jurisdictional issue in No. 72-459.

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1) *The critical factual issues*

Those factors which the Justices have felt are important in deciding the validity of grants or benefits to institutions, which include religious bodies, are:

¶ *Direct Payment*—whether the funds are paid directly to the institution? Or whether the institution is benefited only indirectly, as for example, by being relieved of an obligation to pay taxes?

¶ *Ideological Purposes*—whether if funds are paid directly to the institution, these funds are used for educational content, which may require policing to preserve secularity of use?—or whether they are used for non-ideological purposes?—such as loans or grants, for bricks and mortar, and for physical facilities such as dormitories, gymnasiums, etc.

¶ *Permeation*—whether it is possible to separate religion from education?—or whether the one so permeates the other as to bar absolutely any form of public aid to private education?

¶ *Higher v. Secondary Education*—whether a different result obtains when funds are paid directly to institutions of higher education?—as opposed to direct grants to secondary schools?

¶ *Entanglement—Administrative and Legislative*

(a) *Administrative entanglement*—i.e., whether when aid is paid directly to the institutions involved, the policing of the institutions' use of the funds constitutes undue entanglement between church and state?

(b) *Legislative entanglement* — whether, when funds are paid directly to schools, does lobbying for continuing legislative appropriations create such a potential for devisiveness along religious lines as to violate the First Amendment?

What, then, has been the interplay of these factors discussed above in the recent decisions of this Court and the Opinions of the Justices involving Church and State issues?

2) *The legal issues—recent cases involving church/state relations*

a) **Walz v. Tax Commission,** 397 U.S. 664 (1970).

In *Walz v. Tax Commission, et al.*, all of the Justices, except for Mr. Justice Douglas, who dissented, agreed—(Justices Brennan and Harlan filed separate concurring opinions)—that a tax exemption from state or local taxes for church property did not offend the Constitution. In so holding, the Court clearly delineated between *direct payments* to an institution—and the *indirect benefits* enjoyed by religious institutions from state action which does not constitute direct aid for the advancement of religion. In so doing, the Court pointed out that any form of direct payments to religious institutions were fraught with entanglement problems between church and state—a concept that was further developed and applied to strike down the Pennsylvania Purchase of Secular Educational Services Act in *Lemon v. Kurtzman*, discussed below.

b) **Tilton v. Richardson,** 403 U.S. 672 (1971).

In *Tilton*, the Court rejected a constitutional attack on the use of public funds, paid directly to institutions, including religious schools—where the funds were expended for buildings and facilities used exclusively for secular purposes.

Four members of the Court, Mr. Chief Justice Burger and Justices Harlan, Stewart, and Blackmun, rejected the "permeation" argument discussed below—and upheld direct payments to (1) institutions of higher learning, (2) where the funds were for self-policing, non-ideological purposes such as buildings not used for religious purposes.

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Three members of the Court, Justices Black, Douglas, and Marshall, dissented on the grounds of "permeation"—i.e., that in any educational institution which is sponsored, affiliated, or controlled by any religious group, religion so permeates secular education that one cannot be separated from the other—and that *any* direct payment to any such institution must be barred absolutely. Mr. Justice Brennan dissented on the grounds, *inter alia*, that aid to such institutions benefits both their educational and religious functions.[8]

Mr. Justice White concurred in the judgment but disagreed with what he felt was an unjustified distinction between higher and secondary education, concluding that the case should be remanded for further proceedings to determine whether the recipient institutions were bona fide sectarian institutions.

c) **Early et al. v. DiCenso,** Nos. 70-569, 570 decided *sub nom* Lemon v. Kurtzman, 403 U.S. 602 (1971).

In *DiCenso*, Mr. Chief Justice Burger, speaking for the Court, (Justices Douglas, Black, and Marshall joined in the opinion of the Court and concurred separately, Mr. Justice Brennan filed a separate opinion, and Mr. Justice White dissented) held that a Rhode Island statute, so structured as to provide salary supplements paid directly to teachers in *only* Catholic parochial schools, violated the Establishment Clause.

Mr. Justice White, in his dissent, criticized the majority for holding the act unconstitutional on its face in light of the lower court's explicit finding of fact that the teachers had not mixed religious and secular education. He also dissented from application of the entanglement doctrine.

---

8. His opinion considered as well the *DiCenso* and *Lemon* cases discussed immediately below.

d) **Lemon v. Kurtzman,** 403 U.S. 602 (1971).

In *Lemon v. Kurtzman*, Mr. Chief Justice Burger, writing for the Court, (with Justices Douglas and Black also concurring separately and Justices Brennan and White writing separate opinions) struck down the Pennsylvania Purchase of Services Act, under which public funds were paid directly to nonpublic schools,—religious and secular,—in return for contractual obligations by the schools to teach certain non-religious subjects, such as mathematics, foreign languages, etc. The Court's decision was based solely on entanglement, and let stand, in the face of vigorous opposition from the appellants attacking the Act, the lower court's finding that neither the primary purpose nor the primary effect was to advance religion—but rather that it was for a proper secular purpose—to aid education.

Mr. Justice White concurred in the judgment but dissented from the facial attack on the Pennsylvania Act, believing that the case should be remanded to give plaintiffs an opportunity to prove their charge of permeation.

3) *The common predominant threads of agreement*

Hopefully, in the remaining seven cases to be heard this spring, this Court is now approaching what will be the last round in the relentless efforts of diverse plaintiffs through their common counsel to thwart, on constitutional grounds, the will of the people as expressed by their state legislatures to preserve pluralism in education. As these cases draw to a close, several predominant threads consistently appear in the recent decisions and opinions by the members of the Court:

¶ Five Justices, Mr. Chief Justice Burger and Justices Harlan, Stewart, White and Blackmun, have consistently rejected the concept of "permeation," which has been equally consistently adhered to by Justices Black, Douglas, and Marshall.

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¶ These same five Justices have also agreed that direct payments to institutions, religious or otherwise, for non-ideological purposes, are not unconstitutional on their face; whereas the same three mentioned above have held otherwise, relying principally on application of the doctrine of "permeation;" and Mr. Justice Brennan has also held otherwise, because aid to an institution benefits both its secular and religious functions.

¶ All but Mr. Justice Douglas have agreed that there is a basic difference between a *direct* payment to an institution and an *indirect* benefit conferred by the state, which may benefit a religious institution, but does not constitute advancement of religion. See *Walz v. Tax Commission, supra.*

¶ Finally, no Justice has ever said, nor has any Opinion of this Court ever held, that any of the questions of fact discussed above, that are clearly applicable to a direct payment to an institution or school, have any relevance whatsoever when applied to a grant to an individual, i.e., a parent.

As developed in the brief that follows, when the funds are paid to individual parents, or credited against their taxes, these parents, and they alone, control whether any portion thereof will ever be paid to religious or secular schools.

As individuals, parents have the same basic constitutional rights that plaintiffs so zealously profess to protect—i.e., to make their own free choice on how to educate their children and, in particular, to be free from inquiry as to the religious practices or absence of same at the school which they, in their sole discretion, choose for their children.

Thus, when funds are paid to parents, this precludes, because of constitutional grounds, any inquiry as to how these funds are spent; and, of necessity, precludes any determination that the funds go to any religious schools or that the primary effect of the payments constitutes advancement of religion by the state.

The fundamental difference between payment directly to a school and payment to a parent has been eloquently and succinctly stated by the National Association of Independent Schools in their amicus brief filed with this Court on the jurisdictional issue:

> "To say, as some critics do—and without a shred of evidence to support it—that the parent acts as a mere conduit to the school, is to denigrate the very stuff of which this country's greatness was made and to undermine the rock upon which our Constitution and Bill of Rights is grounded—personal freedom and the right of each individual to make his own free choice.
>
> Where the parent is the recipient of state aid, he alone decides how and where the funds are applied and thus effectively cuts off state control or participation, thereby enabling the state to aid its legitimate interests in secular education, and at the same time, to preserve, in the words of the Chief Justice, the spirit of 'benevolent neutrality' which will neither advance nor inhibit religion.
>
> This is in the best tradition of a country that treasures its private institutions and the freedom and rights of individuals. Far from offending the Constitution, tuition aid to parents supports and reinforces the very principles the Constitution was designed to protect."

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OPINION BELOW

Plaintiffs below filed suit in the Eastern District of Pennsylvania to enjoin enforcement of Act 92 of August 27, 1971, known as the Parent Reimbursement Act, which provides for partial tuition reimbursement to parents of children attending nonpublic schools meeting the State's requirement for compulsory education. On April 6, 1972, the three-judge district court rendered its opinion, denying the motions to dismiss filed by appellant Henry E. Crouter, a parent of children enrolled in nonpublic schools, and the other appellants (defendants below). After answers were filed, the district court by order of July 21, 1972, granted plaintiff's Motion for Summary Judgment on the opinion of April 6, 1972, and perpetually enjoined Grace Sloan, State Treasurer of the Commonwealth of Pennsylvania and her successors in office from paying out any funds of the Commonwealth of Pennsylvania pursuant to said Act 92. The opinion of the lower court is reported in 346 F. Supp. 1356 (1972) and is in the joint Appendix to Nos. 72-620 and 72-459 at pages 37a *et seq.*[9]

JURISDICTION

This action to enjoin enforcement of a Pennsylvania Statute as unconstitutional was brought under 28 U.S.C. §§1331, 1343(3), 2201 and 2202 and was heard by a three-judge court pursuant to 28 U.S.C. §2284. The final decree of the three-judge court was entered on July 21, 1972; Notice of Appeal was filed in the District Court by Appellant Crouter on August 21, 1972. The appeal was docketed on October 20, 1972, and this Court noted probable jurisdiction on January 22, 1973.

The jurisdiction of the United States Supreme Court to review this decision by direct appeal is conferred by

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9. References to the joint Appendix are henceforth designated A. 1a, etc.

Title 28 U.S.C. §1253. That jurisdiction is sustained by the decisions of this Court in *Briggs v. Elliott*, 342 U.S. 350 (1952) and *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

STATUTE AND CONSTITUTIONAL AMENDMENT INVOLVED

The Statute involved is the Pennsylvania Parent Reimbursement Act for Nonpublic Education, Act 92 of the Laws of Pennsylvania, 1971, P.L. — (the "Act"), the full text of which appears at A. 56a *et seq.*

The Act authorizes reimbursement of tuition payments to parents of any child enrolled in a nonpublic school that meets the requirements of Pennsylvania's compulsory school attendance law and the provisions of Title VI of the Civil Rights Act of 1964 (i.e. prohibiting discrimination because of "race, color or national origin"). The Act authorizes payments of up to $75.00 for elementary school children and up to $150.00 for secondary school children or the actual tuition amount paid whichever amount is lesser.

The First Amendment of the Constitution of the United States, made applicable to the states through the Fourteenth Amendment, provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

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QUESTIONS PRESENTED

The three-judge court below held the Act unconstitutional on its face on the alternative reasoning that either its primary effect is to aid the schools, including religious schools, and thus to advance religion (Opinion, A. 51a); or it supports religion by aiding parents in providing a religious education for their children (A. 54a). The questions presented on this appeal are:

1. Where a state seeks to partially reimburse parents (who alone choose to send their children to a sectarian or non-sectarian school) for tuition expense actually incurred at nonpublic schools, does the fact that the Act fails to require that funds disbursed to parents be restricted to secular education or general welfare services, advance religion in violation of the Establishment Clause?

2. Are not the religious practices of any of the schools to which parents seeking reimbursement choose to send their children constitutionally irrelevant since parents have a right of privacy, free exercise of religion, and freedom to make their own choice, and to be free of inquiry by anyone regarding same? And if so, did not the lower court err in finding that the state was involved in the advancement of religion where it based its entire findings on an extra-judicial statement that 90% of the children whose parents would be eligible for reimbursement were enrolled in schools controlled by religious organizations or having the purpose of promoting a particular religious faith?

3. Where state aid for nonpublic education is to the parent and not to an institution, does not this overcome any problems of entanglement between church and state?

STATEMENT OF THE CASE

On August 27, 1971, the Act became law. It created the Parent Assistance Authority to administer the Parent Reimbursement Fund, but with the provisions that the Authority

> "exercise no direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools." (Section 4, A. 60a)

The fund administered by the Authority does not depend on annual appropriations, but rather is funded by a fixed percentage of the revenue collected under Pennsylvania's Cigarette Tax Act. (Section 5, A.60a).

To be eligible for tuition reimbursement up to $75.00 for elementary school students and $150.00 for secondary students, each parent at the completion of the school year must file with the Authority a verified statement that the student has completed the school year in a nonpublic school and that he has paid, or become legally obligated to pay, tuition in excess of that claimed for reimbursement. (Section 6, A. 60a-61a) A copy of this form appears at A. 86a.

The legislature's statement of purpose, found by the lower court to be a valid secular one, declared, *inter alia*, that in light of the valuable contribution made by nonpublic education to the public welfare, it was in the public interest to use public funds to assist parents by partially defraying the cost actually expended by them for nonpublic education.[10]

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10. The full declaration of purpose states:

(1) That parents who send their children to nonpublic schools assist the State in reducing the rising costs of public education.

(2) The welfare of the Commonwealth requires that this and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capaci-

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On September 13, 1971, the appellees (plaintiffs below) filed a complaint, (A. 5a) naming as defendant the State Treasurer. They contended that the Act violated the Establishment, Free Exercise and Equal Protection Clauses of the Constitution and sought an injunction against paying out any funds.

On December 21, 1971, Henry E. Crouter, a parent of children in nonpublic schools, filed a motion pursuant to Rule 24(a) to intervene as a party defendant (A. 17a), and an order granting his motion to intervene was entered

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ties. To further this objective the Commonwealth has had in force for many years a compulsory school attendance law.

(3) In the exercise of their constitutional right to choose nonpublic education for their children, parents who support such education make a major contribution to the public welfare. However, the immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden.

(4) Should parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State. Without allowance for inflationary increase, the annual operating cost of educating in public schools, the five hundred thousand students now enrolled in Pennsylvania's nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). Any substantial portion of these operating and capital costs would be an intolerable public burden and present standards of public education would be seriously jeopardized. Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth.

Wherefore, it is declared to be the public policy of the Commonwealth:

That, in order to reimburse parents partially for this service so vitally needed by the Commonwealth, and in order to foster educational opportunity for all children, a program of Parent Reimbursement for Nonpublic Education is hereby established. (Section 2, pp. A. 57a-58a).

December 27, 1971. (A. 19a). Intervenor Crouter's counsel in this case also represents the Pennsylvania Association of Independent Schools.[11]

Subsequently 12 other parents of children enrolled in nonpublic schools in Pennsylvania were permitted to intervene. (A. 20a *et seq.* and 29a-30a).

All defendants, including Crouter, moved to dismiss plaintiff's complaint, *inter alia*, on the grounds that in alleging that the Act on its face violated the Establishment Clause, the complaint failed to state a claim upon which relief could be granted. (A. 26a).

In addition, Crouter filed a motion to strike the allegations of paragraph 10 of plaintiffs' complaint concerning the alleged characteristics and religious practices of "educational institutions" on the grounds that these allegations were immaterial since the Act does not authorize and direct payment for the tuition of students in any particular educational institution other than a nonpublic school, and that any inquiry of parents as to the religious practices at the schools to which they choose to send their children violates their constitutionally protected rights (A. 25a).

On April 6, 1972, the three-judge district court denied these motions. Asserting that it was bound by this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the lower court held that:

¶ The Act expressed a proper secular purpose, i.e., to aid education and not to advance religion;

¶ The fact that aid is given to parents and not to schools does not prevent the payments from having a primary effect of supporting religious instruction and worship in church related schools. The effect of the Act is to aid these schools;

¶ Since the Act may aid some parents to provide a religious education for their children, it supports religion and violates the Establishment Clause.

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11. See Footnote 3, *supra*.

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On April 28, 1972, the three-judge court granted the appellants' motion to dismiss those counts of the complaint relating to the free exercise and equal protection clauses. Thereafter, all defendants filed answers. Intervenor defendants Seth W. Watson and Anne P. Watson then filed a motion for summary judgment which was denied by order of June 20, 1972, and appellees filed a motion for summary judgment.

Thereafter, on July 21, 1972, and based on the Opinion of April 6, 1972, the three-judge court ordered that plaintiffs' motion for summary judgment be granted and that defendant and her successors in office be perpetually enjoined from paying any funds under Act No. 92.

SUMMARY OF ARGUMENT

The constitutionality of the program established by the Act, which provides partial reimbursement to parents who have paid or become legally obligated to pay tuition to a sectarian or non-sectarian school of the parents' own choice that fulfills the state's requirement for compulsory education, has never been ruled on by this Court.

In some respects, Pennsylvania's parent reimbursement program is similar to the federal legislation authorizing the expenditure of federal funds for the education of pages serving in the Congress and the U.S. Supreme Court.[12] That act, which has been in effect and unchallenged for over 25 years, expressly provides that pages may choose to attend private or parochial schools of their free choice and payments shall be made directly[13] to such schools, but at a rate no greater than that provided for in the public schools.

Also, under the GI Bill, thousands of veterans have used government funds at all kinds of schools, both religious and otherwise, even including attending divinity schools. 72 Stat. 1177 (1958), 28 U.S.C. Section 1620.

Although this Court's recent decisions in *Lemon v. Kurtzman* and *Tilton v. Richardson* sets guidelines for analyzing some forms of aid to nonpublic education, neither deals directly with the issues presented by this appeal, particularly since both concerned direct grants to religious institutions, rather than aid to parents, as here.

Since, as in *Lemon v. Kurtzman*, the legislative declarations to the Act clearly indicate a legitimate secular purpose of aiding all forms of nonpublic education, both sectarian and nonsectarian, by easing the financial burdens of parents who must pay the bill, the Court must accept the

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12. August 2, 1946, C. 753, Title II, Section 243, 60 Stat. 839 2 U.S.C. Section 888a (b).

13. In this regard, the provisions of the Parent Reimbursement Act pose even fewer constitutional problems—since as noted in Section below, there are significant constitutional differences between payment to parents and payment to the school or religious order itself.

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stated secular purpose. Furthermore, by making payments to the parents rather than to the school, the Act avoids the entanglement problems which this Court found invalidated Pennsylvania's Purchase of Services Act in *Lemon v. Kurtzman*.

Moreover, because of the inherent differences between payment to a parent and payment to a religious school, and because the religious practices of the schools involved are constitutionally irrelevant, plaintiffs cannot prevail in their efforts to thwart the legitimate aims of the people of Pennsylvania to support nonpublic education and to avoid the catastrophic financial impact if nonpublic education were to fail because of the serious financial crisis facing it.

The cost to Pennsylvania, if nonpublic education failed, is projected by the legislature as an annual addition of $400 million ($400,000,000) plus added capital costs of constructing new facilities in excess of $1 billion ($1,000,000,000). (A. 58a). President Nixon in his Message on Education Reform to the Congress of the United States on March 3, 1970, estimated this cost at $4 billion per year in operations and $5 billion for more facilities.[14]

Aside from the mere financial aspect, the loss of nonpublic schools as an educational alternative would mean the loss of a priceless asset in our heritage of pluralism and democracy.

Finally we believe and urge upon this Court that an examination of the record will demonstrate that plaintiffs have failed utterly to establish by any competent admissible evidence the heavy burden they assume when attacking state action, i.e., to establish that the effect of this Act advances religion or involves state action in sponsorship of religion.

For these reasons, and based upon the constitutional arguments developed more fully below, we urge this Court to reject appellees' attack and thereby uphold the constitutional validity of Pennsylvania's Parent Reimbursement Act.

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14. That entire portion of his message is reprinted in Exhibit B, at pp. 58-59.

ARGUMENT

1. The lower court misinterpreted and misapplied the rules laid down by this Court in *Lemon v. Kurtzman*.

This Court, in the Opinion of Mr. Chief Justice Burger in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), summarized the 3-fold test for measuring whether public aid to non-public education violates the Establishment Clause:

> ¶ "First, the statute must have a secular legislative purpose;
>
> ¶ Second, its principal or primary effect must be one that neither advances nor inhibits religion; *Board of Education v. Allen*, 392 U.S. 236, 243 (1968);
>
> ¶ Finally, the statute must not foster 'an excessive government entanglement with religion.' " 403 U.S. at 612-613. (paragraphs supplied for clarity)

The Pennsylvania Act discussed in *Lemon v. Kurtzman* authorized direct payments to religious or secular schools for purchase of secular educational services, and this Court:

> ¶ found a proper secular legislative purpose;
>
> ¶ declined to rule on whether the Act had a primary effect that advanced religion but inferentially concluded that it did not and let stand the lower court's ruling that it did not (see 403 U.S. at 613-614); but
>
> ¶ ruled that the controls imposed on the institutions receiving funds to insure that funds would not be used for religious purposes constituted undue entanglement between Church and State in violation of the First Amendment.

Contrary to the assertion of the lower court (A. 46a), there is nothing in the Court's decision in *Lemon v. Kurtzman* that controls or bars reimbursement to parents under the Act here considered. As developed in section 2(d) below, where payment is made to the parent, the factual and legal

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considerations are entirely different. And as noted in the foregoing Introduction, this Court has never ruled that public aid to parents is governed by the same strict rules that apply when public funds are paid directly to a sectarian school.

Although *Lemon v. Kurtzman*, as noted above, concerned direct payment to religious and secular institutions, this Court specifically declined to hold that those payments constituted advancement of religion. As this Court has frequently pointed out in Establishment Clause cases, the facts of each case must be carefully analyzed. Some of the general principles applicable are:

> 1. There is no precise and absolute test; "we can only dimly perceive the boundaries of permissible government activity in this sensitive area. . . ." *Tilton v. Richardson*, 403 U.S. 672, 678 (1971);
>
> 2. The role of government is to be neutral—it must neither advance nor inhibit religion. *Board of Education v. Allen*, 392 U.S. 236, 242-43 (1968); its role is that of "benevolent neutrality." *Tilton, supra* at 679;
>
> 3. The test is not whether a religious institution may be benefited, but whether the principal effect of the Act is to advance religion. *Tilton, supra* at 679;
>
> 4. The American public places a high value on the importance of nonpublic education.[15]

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15. ". . . private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students." *(Board of Education v. Allen*, 392 U.S. 236 at 247-248).

The foregoing principles are best summarized in Mr. Chief Justice Burger's Opinion in *Walz v. Tax Commission*, 397 U.S. 664 (1970) at 669:

> "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: *that we will not tolerate either governmentally established religion or governmental interference with religion.* Short of those expressly proscribed governmental acts *there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." (Emphasis added.)*

2. The ultimate issue in this case is whether the Act involves the state in sponsorship or advancement of religion.

(a) *The Act has a secular legislative purpose.*

The lower court properly found that the Act expresses a legitimate secular objective consistent with the Establishment Clause, i.e, to further the state's interest in education for its citizens. (A. 43a).[16] The legislative declaration of purpose set forth in full in footnote 10, *supra*, is a legitimate secular purpose, as was that upheld in *Lemon v. Kurtzman:*

> "Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes them-

16. Although its opinion clearly demonstrates that it *in fact* did not accept the secular purpose of the legislation. (See Opinion, A. 52a, and discussion in section 2(d) below.)

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selves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else. A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate. As in *Allen*, we find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference," 403 U.S. at 613.

(b) *The Act does not have the principal or primary effect of sponsoring or advancing religion.*

The ultimate question presented here is whether the lower court's holding that the principal or primary effect of the Act advances religion is correct. Appellant Crouter contends that it is not.

The lower court held the Act unconstitutional on two grounds:

1. "The mere fact that the Act does not require that parents use the funds to pay tuition at church-related schools does not relieve the state of its duty to preclude the use of its funds to support religious activities," citing as its authority *Tilton, supra* (See Opinion, A. 53a).

2. The unsupported finding in its order of July 21st that "more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith." (A. 87a).

The court's reliance on *Tilton* for proposition number one above is totally unjustified. That requirement in *Tilton* applied to a direct grant of funds to a religious institution for physical facilities,—and was mandated by this Court to insure that at no time in the future would the facilities

be used for religious purposes. It has no application whatsoever to the case at bar.

The court's reliance on the statement that 90% of the children attending nonpublic schools attend schools controlled by religious organizations is likewise the weakest kind of bootstrap jurisprudence. Putting aside the validity of the factual premise (see discussion in section 4 below), the fact remains that the lower court assumed a premise which, because of the interposition of the parents and their constitutionally protected status, cannot be used as the basis of a constitutional attack. (See discussion at section 2(d) below).

(c) *The proper test under the Establishment Clause is not whether the Act benefits schools, religious or secular, but whether it advances religion.*

As previously noted, state action can benefit religion or religious institutions without advancing religion. By authorizing payments directly to eligible parents, the Legislature has structured the Act to avoid entanglement and to prevent it from having any involvement in, let alone advancement of, religion.

Even though the Act does not fix eligibility along religious lines, nor restrict in any way the parents' use of the payments when received, the court below held the Act invalid on the ground that since the Act could potentially and indirectly benefit church-related schools, the State has failed to preclude use of its funds to support religious activities.

The court below then erroneously concluded as a matter of law, without any factual record to support its ruling, that the Act's primary effect is to advance religion and that the effect differs materially from the primary purpose of state aid to education.

In reaching such a conclusion, the court has misconstrued the true meaning of the term "advancement of religion."

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(1) *"Mere benefit" is not equivalent to advancement of religion.*

This Court has, on many occasions, taken great pains to distinguish between programs that advance religion contrary to the First Amendment and acts that may indirectly benefit religious institutions as permitted by the Amendment. In so doing the following have been upheld:

¶ the right of Catholic schools to fulfill compulsory educational requirements, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925);

¶ transportation reimbursement payments to parents, *Everson v. Board of Education*, 330 U.S. 1 (1947);

¶ released time for religious instruction from public school, *Zorach v. Clauson*, 343 U.S. 306 (1952);

¶ textbook loans to nonpublic school children, *Board of Education v. Allen*, 392 U.S. 236 (1968);

¶ construction grants to sectarian institutions of higher learning, *Tilton v. Richardson*, *supra*, (1971).

In the non-educational area, there are many decisions affirming the constitutional propriety of state action that clearly benefits religious institutions without advancing religion:

¶ Grants to religious orders for hospitals, *Bradfield v. Roberts*, 175 U.S. 291 (1899);

¶ Sunday closing laws, *McGowan v. Maryland*, 366 U.S. 420 (1961);

¶ Tax exemption from property taxes, *Walz v. Tax Commission*, 397 U.S. 664 (1970).

The test, as stressed by Mr. Chief Justice Burger in the Court's Opinion in *Tilton, is not whether there is an incidental benefit to religion—but whether the primary effect of state action is to advance religion.* See *Tilton*, *supra*, at 679.

(2) *Advancement of religion requires active sponsorship.*

Advancement of *religion* results only when the state *actively* and *directly* promotes religion, such as by the establishment of a state church or by insisting on Bible reading or compulsory prayers. Thus, over the years, the Supreme Court has invalidated education laws on the grounds of primary religious effect in only three cases:

- ¶ *Abington v. Schempp*, 374 U.S. 203 (1963) (compulsory school prayers);
- ¶ *Engle v. Vitale*, 370 U.S. 421 (1962) (compulsory school prayers);
- ¶ *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948) (religious instruction in public schools).

The practices struck down all involved religious exercises in *public* schools and were also programs whose *purpose* was *to advance* religion. By contrast, in the five cases upholding state benefits to nonpublic institutions, individuals were exposed to the benefited institutions only by their own free choice. See *Tilton v. Richardson, supra; Walz v. Tax Commission, supra; Board of Education v. Allen, supra; Everson v. Board of Education, supra; Quick Bear v. Leupp*, 210 U.S. 50 (1908).

(3) *Aiding parents with their education expense does not involve the state in advancing religion.*

The lower court's equating any benefit to religion as the equivalent to advancement of religion is clearly demonstrated by its conclusion that the Act is invalid because it aids parents in obtaining religious education for their children:

> "Finally, even if we held that the Act does not aid sectarian schools, we must still conclude that the Act supports religion because it aids parents in providing a religious education for their children. It would seem indisputable that at least one, if not the main, purpose

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of a parent's sending his child to a religious school is to insure the early inculcation of religion. See Walz, supra, 397 U.S. at 671. Assuming equal secular educational standards as between public and religious schools[17] it is an almost inescapable sequitur that the statutory reimbursement is solely to enable the parents to augment the public school secular education with religious training." (A. 54a-55a).

This Court rejected this very argument in *Pierce v. Society of Sisters*, where it upheld the right of parents to send their children to nonpublic schools, whether religious or secular; in *Allen*, where it refused to invalidate textbook loans simply because these might aid parents in sending their children to nonpublic schools; in *Everson*, where it failed to invalidate free public transportation to Catholic school pupils even though this might aid parents in providing a religious education for their children; and indeed, in *Lemon v. Kurtzman*, where the Court held that the Pennsylvania Act for Purchase of Secular Services which gave money directly to the schools had a proper and legitimate secular objective.

The above quoted language of the court clearly indicates that they in fact improperly refused to accept the secular purpose of the statute although there was no evidence in the record to contradict or overturn the legislative declarations.[18]

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17. There is no factual basis in the record for such an assumption.

18. In *Tilton v. Richardson*, Mr. Chief Justice Burger reaffirmed this Court's extreme reluctance to assume that the proper purposes of a carefully drafted Act will be subverted in the actual administration of the Act:

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." 403 U.S. at 679.

And see discussion at Section 4 below.

(d) *Payment to a parent rather than to the school is a distinction that makes all the difference in constitutional result.*

The lower court held that payments to parents, rather than to schools, was a distinction without a difference:

> "However, we do not perceive any constitutional significance in the fact that payments are made in the form of reimbursement to the parents, a conduit plan or directly to the school." (A. 54a)

We believe that this distinction makes *all* the difference.

(1) *Parent becomes a wall of separation between church and state.*

Mr. Chief Justice Burger, speaking for all but Justices Brennan and Douglas in *Walz*, and in delivering the opinion of the court in *Lemon*, rejected out of hand the argument so frequently advanced by opponents of aid to education—that there must be a "wall of separation" between Church and State. Thus, "far from being a 'wall'," he stated, it "is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." (*Lemon v. Kurtzman, supra*, at 614). Pointing out that the State's proper role is one of "benevolent neutrality," he also cited with approval Mr. Justice Douglas' opinion in *Zorach* (released time from public school for religious instruction at parents' option), that "when the State encourages religious instruction . . . it follows the best of our traditions." *Watz, supra* at 672.

Regardless of what test is used for determining the proper degree of separation, when funds are paid to the parent, he does in fact under the Pennsylvania Act become a "*wall of absolute separation*" that terminates any further constitutional inquiry.

To say that there is no constitutional difference between a grant to a parent and one to a school is the same as saying

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that there is no essential difference between (1) an inheritance or gift from a grandparent, payable to the parents to use in their discretion for education of the donor's grandchild and (2) a grant made directly to a particular school designated by the grandparent. To state the question by this analogy is to answer it.

As in the first hypothetical situation above, the parent's absolute freedom of choice under the Pennsylvania Parent Reimbursement Act is very real. It means that no school, religious or otherwise, can count on getting funds since the parent always possesses the absolute right to withdraw his child and send him to another school or to pass up the payments entirely and send his child to public school.

When funds are paid to the parents, this represents the classic case where the government is preserving its traditional role of "benevolent neutrality," of neither advancing nor inhibiting religion.

When the parents, and they alone, make the choice between public, secular, private or religious schools, they do become a wall of absolute separation between Church and State. Since neither the State nor the school can control the funds, neither has any leverage over the other nor are there any points of friction or contact between the two. The parent receives the money and it is *his*—his alone—to spend at the race track, to put in the bank, or to do with whatever else he chooses.

(2) *Inquiry or proffered evidence as to the existence and nature of religious practices, if any, at the school chosen by the parents violates their constitutional rights.*

There is a basic and fundamental *constitutional* difference between payment to parents and payment to a religious school. Where payment is made to the parent for partial reimbursement of the cost of providing secular education which the state requires for his child, the same First

Amendment, which opponents of the Act so zealously profess to protect, likewise forbids inquiry of the parent, by the State or the courts, or offering evidence, regarding religious[19] practices, if any, at the school chosen. Any such inquiry violates the parents' free exercise rights and their traditional freedom of choice and conscience in matters of educating their children and of religion, as well as their right of privacy.[20]

The individual's right of privacy and freedom of choice was reaffirmed in this Court's recent opinion in *Roe v. Wade*, No. 70-18, decided January 22, 1973, slip opinion page 37. As noted long ago in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1922):

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [citations omitted]."

This principle was reaffirmed in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) where the Court upheld the

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19. This is specifically forbidden under the Act. (See §4, A 60a.)

20. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117, 129 (S.D. N.Y. 1969) affirmed 401 U.S. 154 (1971); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

The Court below recognized this problem but failed to come to grips with it. See discussion below, p. 34, especially footnote 22.

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right of parents to provide for sectarian or non-sectarian training of their children, and again in *Wisconsin v. Yoder*, — U.S. —, 92 S. Ct. 1526 (1972).

Just as an individual has the right to be free from inquiry by the state into the contents of his library, the state cannot tell a man in the privacy of his home what books to read and cannot control a person's private thoughts, *Stanley v. Georgia*, 394 U.S. 557 (1969). So also, the state cannot inquire from a parent as to the reasons for his choice in educating his children. Any such inquiry invades the private rights of parents as individuals. *Watkins v. United States*, 354 U.S. 178 (1957). And for the same reason, it is equally improper to base a decision of unconstitutionality, as did the court below, on the unproved premise that 90% of the children attending nonpublic schools attend religious schools.

This right to privacy, whether it is found in the First, Fourth, Fifth, or Ninth Amendment or in the concept of liberty guaranteed in the Fourteenth Amendment[21] requires that where payments are made to individual parents, it is beyond the scope of permissible inquiry even to attempt to establish as a legal proposition that funds are used for or diverted by the parents to religious purposes. For the same reason, it would be beyond the right of welfare officials to probe into the religious practices of a charity to whom an individual on welfare elected to make a contribution out of money given to him for subsistence by the state,—yet following the logic of the lower court's opinion, any state or federal statute which makes a grant of funds to an individual for any lawful public purpose—i.e., education or welfare,—would fail unless there are strict limitations prohibiting any portion from being used for religious purposes.

The court below, however, in order to justify a decision previously reached, completely disregarded these critical constitutional issues,—issues which it recognized as a

21. See discussion in *Roe v. Wade*, *supra*.

serious problem, but which it declined to rule on at the pleading stage as premature.[22]

Three months later (see the Order of July 21, 1972, A. 87a) the court decided this fundamental constitutional issue without any discussion or citation of cases but by blandly assuming as a proven fact that the reimbursement to parents went directly to schools, 90% of which the court held to be religious even though this fact was denied, put at issue in the pleadings and vigorously objected to.

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22. Footnote 5 of the Court's opinion reads as follows:

"Defendant intervener Crouter has moved under F. R. Civ. P. 12(f) to strike paragraph 10 of plaintiff 's complaint as immaterial and as requiring inquiry into the religious practices and character of schools to which parents choose to send their children in violation of the parents' rights of free exercise of religion, privacy , and freedom of expression.

F. R. Civ. P. 12(f) provides that "the court may order stricken from any pleading, any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Defendant maintains that the allegations of paragraph 10 concerning the religious character of non-public schools are constitutionally irrelevant because the Act does not give aid to schools, but to parents. However, the issue of whether the Act aids religious schools or aids parents to provide a religious education for their children is one of the issues in dispute in this litigation, and the allegations of paragraph 10 are certainly relevant to the plaintiffs' claims.

". . . The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversy." *Brown and Williamson Tobacco Corp. v. U. S.*, 201 F.2d 819, 822 (C. A. 6, 1953). *See also August v. Bd. of Public Instruction*, 306 F.2d 862, 868 (C. A. 5, 1962), 2A J. Moore, *Federal Practice* §12.21[2] (2d ed. 1968).

Defendant's further objection concerning the constitutionality of inquiring into the religious character of the schools *is premature and should be raised once such information is actually sought*. We therefore deny defendant intervenor's motion to strike paragraph 10. (emphasis added).

See also discussion at section 4 below.

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Under these circumstances, the lower court clearly erred in resting its entire decision on the premise that the Act supports religion, particularly where the record is devoid of any evidence that public funds were in fact used by parents to secure religious education for their children, and where any effort to offer such evidence, must fail because of constitutional limitations that protect the parents or the schools they choose from any such inquiry or attempted proof.

(e) *The reimbursement does not advance religion since the amount paid is less than the cost per pupil of public education.*

Finally, where, as in this case, the amount of reimbursement is substantially less than the per pupil cost of public education,[23] it cannot be contended that public funds are used to advance religion—since under the Act, any school to qualify for parent reimbursement must meet the state's same high standards for compulsory education as do the public schools.

3. By providing state aid to the parent and not to the institution, the Act overcomes any problem of entanglement.

The court below, and we submit properly, rejected plaintiffs' contentions that the Act was unconstitutional because of entanglement problems.

Entanglement problems were overcome by omitting from the Act the "restrictions and surveillance" which had been written into Pennsylvania Act 109 for purchase of service contracts for secular education and which caused that

23. The total general fund expenses compiled from the annual financial reports of Pennsylvania school districts show a total cost per public school pupil in the school year 1969-70 of $943.22. Statistical Report of the Secretary of Education for the school year ending 1970.

Act to be stricken down, *Lemon v. Kurtzman, supra* at 620-621.

Secondly, since under the present Act no payments are made to any religious schools or institutions, the situation "pregnant with involvement," which this Court discussed in *Walz*, does not exist here.

Clearly, when a benefit is conferred on a parent, either by tax credit or by reimbursement (both have the same effect in terms of net dollars to the parent)[24] the problem of administrative entanglement does not exist, since there are no strings attached to the benefit other than that the recipient certify that he has spent X dollars on tuition at a nonpublic school.

Furthermore, the problem of political entanglement does not apply here, where the interested party is an individual—a citizen of the United States, clothed as he is with the Constitutional protection and guarantee of his rights of free speech, freedom of assembly, freedom of petition, et cetera. See *e.g., Hague v. C.I.O.*, 307 U.S. 496 (1939).

Finally, the Act does not pose the entanglement problems which prompted the lower court to strike down the Ohio statute. *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio, 1972, aff'd. No. 71-1664, October 10, 1972). The Pennsylvania Act is self-executing in that the funds are automatically allocated by a percentage of the cigarette tax, and do not require annual action by the general legislature as did the Ohio statute. Compare *United States v. Butler*, 297 U.S. 1 (1936) with *Mulford v. Smith*, 307 U.S. 38 (1939) and *Wickard v. Filburn*, 317 U.S. 111 (1942).

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24. In reality, a tax credit is no different from parent reimbursement. In both cases, the net financial effect to the parent who pays taxes is exactly the same—i.e., either cash in hand or cash credit against taxes owed. Furthermore, there is no difference, insofar as entanglement between church and state is concerned, —because in neither situation is any effort made by or required of the granting authority to check on the scope of religious activities. A tax credit or a payment is self-policing.

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Moreover, since as noted above the rights to free speech and freedom to petition the government are essential elements of democracy, the fact that an individual has exercised these rights and sought passage of legislation which he favors and which will benefit him, cannot be used to declare such legislation unconstitutional.

4. Appellees have failed to meet their burden in proving the Statute unconstitutional.

(a) *Appelles in challenging the Act have the burden of overcoming the presumption of constitutional validity by clear and precise evidence.*

An axiom in constitutional law is that every statute is presumed constitutional. This presumption can only be overcome where those who challenge it meet their burden of proof by relevant and constitutionally admissible evidence. *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969). A state is presumed to have acted within its constitutional power until the contrary is shown, *Lindsey v. Normet*, — U.S. —, 92 S. Ct. 862 (1972), and a statute must clearly conflict with the United States Constitution for a federal court to override state legislation. *New York v. O'Neill*, 359 U.S. 1, 5 (1969).

This general proprosition of constitutional law applies in First Amendment cases as well as others. As noted in *Everson v. Board of Education*, 330 U.S. 1, 16 (1946):

> "We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the State's constitutional power *even though it approaches the verge of that power.* See *Interstate Ry. v. Massachusetts*, Holmes, J. [207 U.S. 79] at 85, 88." (emphasis added).

In addition, one who challenges the constitutionality of an enactment must produce a clear, precise and explicit factual showing of unconstitutionality. *Madden v. Commonwealth of Kentucky*, 309 U.S. 83 (1940), *Bute v. People of the State of Illinois*, 333 U.S. 640 (1948), *District of Columbia National Bank v. District of Columbia*, 348 F.2d 808 (D.C. Cir. 1965).

Failure to produce such evidence, particularly in areas involving the First Amendment, requires the Court to uphold the validity of the statute. As stated so clearly in *Board of Education v. Allen*, 392 U.S. 236, 243 (1968):

> "The express purpose of Section 701 was stated by the New York Legislature to be the furtherance of the educational opportunites available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose."

(b) *There is no factual basis in the record in this case to support the lower court's finding that the effect of the Act is different from its stated purpose.*

The record of this case is totally devoid of any evidence that the effect of the Pennsylvania Act so deviates from its avowed and proper purpose as to render it unconstitutional.

The clear purpose and undeniable effect of this legislation is to ease the financial burden of the parents who must pay the bills for nonpublic education—including both sectarian and non-sectarian schools, and thus to safeguard the public treasury against the staggering drain that would occur if these schools were to collapse.

While the lower court verbally acquiesced in the secular legislative purpose of the Act; it then held, with no evidence to support such an assertion, that the purpose of the Act was *in fact* to aid religion:

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"The State cannot maintain that the Act has the purpose of promoting education by supporting non-public schools and then deny that the effect of the Act is to aid these schools." (A 52a)

There are three flaws in the lower court's logic:

First, the legislature's declaration of purpose was misconstrued by the court. The purpose is *to aid parents* who render a vital service to the state and to reimburse them for what would otherwise be an intolerably greater financial burden on the state. Obviously, the ultimate effect is to benefit nonpublic schools. But this is a distinction that makes *all* the difference. By paying the funds to the parents, and not the individual school, the parent and not the school has all the leverage. The school can only get tuition monies when the parent chooses to send his child there.

Second, the court assumed that nonpublic schools are synonymous with religious schools (See order of July 21, 1972), an assumption with absolutely no evidentiary support, and which is patently wrong.

While it is true that religious schools of the Catholic faith predominate in the field of nonpublic education, there are a host of private schools, as well as schools controlled by or related to other religious faiths, such as The Society of Friends (Quaker), Lutheran, Presbyterian, Episcopalian, Methodist, Jewish, and other denominational church related schools, which enthusiastically support the Pennsylvania Act and whose parents would benefit from its provisions. That is precisely why the Pennsylvania Association of Independent Schools has authorized its counsel to assist Crouter in pressing this appeal.

Third, the Court's assumption that 90% of the children attend religious schools committed to a particular religious faith, even if factually correct, is constitutionally irrelevant and beyond the scope of permissible inquiry,

where, as here, the public funds are paid to the parents. For, as developed above, see section 2(d), the parents receiving these funds have a right to be free of inquiry regarding the religious practices or absence of same at the school to which they choose to send their children.

For the purpose of its opinion on the motions to dismiss and to stirke, the lower court accepted as true the allegations of paragraph 10 of plaintiffs' complaint, (A. 7a) concerning alleged religious characteristics of educational institutions which children attend whose parents are eligible for tuition or partial tuition.

Crouter's motion to strike (A. 25a) paragraph 10 was denied by the lower court. The lower court in footnote 5 to its Opinion,[25] recognized this motion presented grave constitutional issues which might pose serious problems to plaintiffs, who, after all, do have the burden of proving religious effect, but dismissed the issues as premature.

These allegations of paragraph 10 of plaintiffs complaint were put at issue in Crouter's Answer to plaintiff's complaint and vigorously objected to on constitutional grounds. (See in particular Crouter's Motion to Alter or Amend Judgment filed on August 3, 1972 and reprinted at A. 88a.)

When confronted, however, with the plaintiffs' subsequent Motion to declare the Act unconstitutional on its face, notwithstanding that the pleadings put these matters at issue, the court rode roughshod over this constitutional issue. With no further evidence of any kind before it, the court found in its order of July 21, 1972, that:

> "more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith." (A. 87a)

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25. See footnote 22 for the entire footnote.

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The court based its entire finding that the primary effect of the Act was to advance religion on the extra-judicial statement appearing above in its Order of July 21, 1972. And this was done in the face of the finding that the primary *purpose* of the Act was to aid and advance non-public education, which has been universally recognized as a proper and highly laudable public purpose. See *Board of Education v. Allen*, 392 U.S. 236, 247-248.

In its opinion, the lower court held that payments to the parents in reimbursement of tuition aided the schools, including religious schools. The Court then held that the failure to restrict this aid to secular use, despite the secular purpose of the Act, violated the Establishment Clause.

This holding clearly ignores *Allen* and *Everson*, notwithstanding the attempt of the lower court to distinguish those cases as involving "non-ideological or secular" school activities.

However, reimbursing parents for bus transportation to nonpublic schools or providing free transportation and thus saving parents the cost, is not advancement of religion, *Everson, supra;* nor is tuition reimbursement. Either may permit a child, otherwise unable, to attend non-public school; and once there, the student obviously participates in secular training and religious, if any. (The New Jersey statute upheld in *Everson* applied only to Catholic nonpublic school children.)

Moreover, the lower court ignored a critical feature of *Allen, supra.* The Court in *Allen* refrained from striking down the New York textbook statute *because there was no evidence in the record* that the textbooks loaned were religious in content *and the Court therefore assumed that the effect of the statute was the same as its stated purpose:*

> "Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose." *Allen, supra* at 243. See also *Allen,* at 245 and 248.

Similarly, absent evidence the court cannot conclude that the effect of the Act differs from its secular purpose.[26]

(c) *The lower court erred in striking down the Act because of a "possibility" that it could aid religious schools.*

The court below incorrectly assumed that it had power to hold a statute unconstitutional if it could conjecture a "possible" misuse of government funds. As it noted:

> "The Court can conclude that the statute has the effect of advancing religion if the terms of the statute fail to preclude a *possible* use of government funds to promote religious exercises." (A. 49a).
>
> . . .
>
> "It is clear that a *possible* and quite likely use of the aid under review is to enable parents to continue to pay tuition at sectarian schools." (A. 53a). *(emphasis supplied).*

Not only is this legal theory directly controverted by the holding of *Allen* and *Everson* discussed immediately above, but this Court has frequently noted that a Court cannot strike down a state statute on a mere possibility:

> "Striking down a state law is not a matter of such light moment that it should be done by a Federal Court

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26. The absence of any factual record also distinguishes this case from *Wolman v. Essex, supra.*

The Ohio Court's opinion was based upon a full and thorough review of an extensive factual record much of which was irrelevant on constitutional grounds but from which it could have been argued that its effect was different from its stated purpose—i.e., that its effect was to favor a particular religious denomination.

On the contrary, no evidence concerning any factual issues has been submitted in this case.

Moreover, as noted by intervenor defendant Crouter's motion to strike, and motion to alter or amend judgment, any inquiry concerning a parent's use of the reimbursement, his religious views, or the religious practices at schools attended by his children violates his freedom of conscience and religion, and invades his privacy. (See discussion at section 2(d).

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ex mero motu on a postulate neither charged nor proved but which rests on nothing but a possibility. Cf. *Liverpool N.Y. & P.S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39." *Everson, supra* at p. 4, footnote 2.

This Court's voiding of the 20 year provision in *Tilton v. Richardson*, 403 U.S. 672 (1971) was not based upon "a possibility" but upon the fact that the building after twenty years had a value which was unrestrictedly contributed to a religious body, since in *Tilton*, unlike here, the funds went directly to the religious institution, and in no way involved parents.

CONCLUSION

Historically, private elementary and secondary education has made a significant contribution to and played a unique role in this country. This role has been recognized by this Court. *See, e.g., Pierce v. Society of Sisters, supra, Allen, supra.* Private education must be preserved if we are to retain the pluralism and spirit of democracy to which our Constitution and judicial system are dedicated. However, the continued viability and vitality of private education is imperiled by the severe economic crisis facing it.

Fortunately, our people are at long last moving towards solutions, as their elected representatives in the Congress and state legislatures throughout the land genuinely experiment to find ways that public monies can be used to further nonpublic education and still preserve the neutrality of government by neither advancing nor inhibiting religion in the process.

The cases are legion in church-state relations where the judicial branch of Government has been called on as the arbitrator in the delicate balancing of conflicting interests. While there always will be a wide diversity of views, the fact remains that a majority of the Justices of the Supreme Court in decisions from *Bradfield v. Roberts*, 175 U.S. 291 (1899) to *Lemon v. Kurtzman*, 403 U.S. 602 (1971) have

recognized certain basic principles of constitutional law that lead inexorably to the conclusion that the will of the people of Pennsylvania should not be thwarted by declaring the present Act unconstitutional. These principles are:

¶ Public aid to private education serves a proper public purpose.[27]

¶ It is possible to separate religious from secular education. A majority of the Justices have rejected[28] the absolutist view that religion and secular education are so intertwined, with each permeating the other, that any form of aid to education that in any way benefits religion must be totally barred by the First Amendment.

¶ It is both possible and constitutionally permissible to distribute public funds or use state action in such a way that religion and religious institutions may indirectly benefit while still preserving government neutrality.[29] This is particularly so where funds are paid not to the institution, but to those who directly benefit and can control their use.

Finally, we recognize and are sensitive to the awesome and difficult responsibility which faces this Court in deciding the questions raised by the Church-State cases now before this Court. These are questions which vitally affect the national interest:—i.e., whether pluralism or a monolithic structure of public education is to prevail. We believe

27. *Everson v. Board of Education, supra* at 7; *Board of Education v. Allen*, 392 U.S. 236, 247-248 (1968).

28. See Opinion of Chief Justice Burger, in *Lemon v. Kurtzman*, 403 U.S. at 613 where he stated:

> "The legislatures of Rhodes Island and Pennsylvania have concluded that secular and religious education are identifiable and separable. In the abstract we have no quarrel with this conclusion."

And also Court's Opinion in *Tilton*, 403 U.S. at 679-680.

29. See Discussion *supra*, Sections 2(c) and (d).

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that the former is more in keeping with the free democratic traditions of this country, and we also recognize that this is a question of educational philosophy on which there is much difference of opinion. But we suggest that this is an issue which has been resolved by the people in open debate through their elected representatives[30] and not a legal issue which this Court must resolve.

Mindful of the frequent admonition that a court's power to declare state action unconstitutional should be sparingly exercised, only in compelling circumstances, and then only with great care,[31] we urge this Court to reject the constitutional attack on the Pennsylvania Act, particularly in view of the strong public interest, as evidenced by extensive state action in this area[32] to preserve and improve the high quality of private education.

We ask this Court to rule that the plaintiffs have failed utterly to meet the heavy burden they undertake when seeking to upset state action in an area which so vitally affects the national interest. We ask this Honorable Court to find that the Pennsylvania Reimbursement Act:

¶ does not have as its primary effect the advancement of religion;

¶ represents a lawful and valid expression of the genuine desire of all the people of this Commonwealth to

1) ease the financial burden of those parents who must pay the lion's share of the cost and

2) thereby avoid the resulting financial crisis to the public treasury should all nonpublic education fail;

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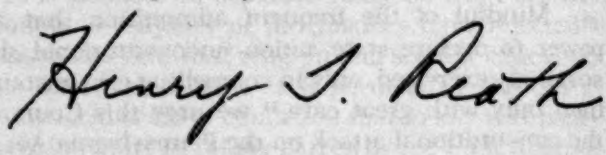
30. See Exhibit C, pp. 60-61, *infra*.

31. *Walters v. City of St. Louis*, 347 U.S. 231 (1954); *New York v. O'Neill*, 359 U.S. 1 (1959).

32. See Exhibit C, *infra*.

¶ eliminates the objectionable entanglement features that were fatal to the Pennsylvania purchase of secular services plan in *Lemon v. Kurtzman*, by reimbursing parents rather than making payments directly to the schools or to religious orders that operate them.

Respectfully submitted,



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APPENDIX

EXHIBIT A

[Caption omitted in printing].

Amicus Curiae Brief of Benjamin Banneker Urban Center in Support of Defendants Motion to Dismiss Pursuant to F.R.C.P. 12

The Benjamin Banneker Urban Center (hereinafter "Center") is a privately controlled non-profit corporation organized and existing under the laws of Pennsylvania. It files this Amicus Curiae brief in opposition to plaintiffs' attack on the constitutionality of the "Pennsylvania Parent Reimbursement Act for Non-Public Education" (hereinafter "Act") [Act 92, 1971].

The Center is located in West Philadelphia's predominantly Black Mantua community, composed of approximately 200 acres with a population of about 22,000. Mantua is bounded by Spring Garden Street, 40th Street and the Penn Central railroad tracks and Drexel Institute of Technology. Mantua suffers considerably from urban blight, such as poverty, unemployment and under-employment, juvenile delinquency, drug addiction, sub-standard housing, poor school attendance, malnutrition and poor

sanitation. Enrollment in the Community's local public schools is virtually all black.

The Center is an innovative, pluralistic educational institution which cooperates closely with the School District of Philadelphia, with local businesses, industry and institutions of higher learning and with the Young Great Society.

The Center opened in 1970 with two groups of students, a class of approximately 75 seventh graders and a group of approximately 25 dropouts, hard-core rejects from and of the traditional public school system. During its first six years of operation, the Center plans to expand upward at the rate of one grade a year until it is serving grades 7 through 12. Long range plans project that by 1990 the Center will be a "total school" extending from preschool to graduate studies.

The Center's philosophy is embrasive and hopeful. The Center believes, *inter alia*, that:

(1) All young people must have a right to a comprehensive first-rate education of their choosing, including a right to essential supportive services, such as, medical, counselling, nutritional, and those elements which make a student free to learn.

(2) All young people must not simply be trained for narrow or specified careers, but must be educated to best compete for survival and success in our increasingly complex and demanding society. Fundamental to this survival and success is skill in conceptualization and analysis, the ability to effectively direct knowledge to solve new problems.

To achieve its educational goals the Center has pioneered a grass roots educational system including:

(1) Innovative Educational programs

(2) Vocational Counselling and Guidance Services

(3) New Careers in Rehabilitation

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(4) Developmental Human Services for Children and Families
(5) Medical-Mental Health Services
(6) Library Services
(7) Cultural Enrichment

The Center is clearly a nonpublic school within the meaning of the Pennsylvania Parent Reimbursement Act for Nonpublic Education (hereinafter the "Act"), and likewise meets the requirements of Title VI of the Civil Rights Act of 1964. Parents of children attending the Center are eligible to seek the Act's partial reimbursement for tuition. The Center files this brief on their behalf because partial tuition reimbursement to parents will encourage the Center and other similarly situated pioneer education institutions which are trying to develop meaningful new responses to the traditional educational defaults which have contributed too much to today's urban problems. The Center's pupils are not strangers to the urban vicissitudes aforestated at p. 1.

In many cases, they are the children of broken homes, broken careers, and broken hopes. For them, the Center is attempting to structure a new and relevant educational process which can be molded to their individual educational needs. The traditional public school structure cannot offer this mobility and individual flexibility.

The Act recognizes the wisdom and necessity of energizing the traditional public school system by pursuing creative and individualized private school opportunities.

The Act's statement of legislative purpose reiterates the Commonwealth's policy of giving children full opportunity to develop their intellectual opportunities. The Center was founded on the theory that parents must have an alternative choice to the existing public education system. The search for countervailing quality educational alternatives is fueled by educational institutions such as the Center.

Accordingly, the Center adopts the principles and reasoning set forth in the Amicus Curiae Brief of the Pennsylvania Association of Independent Schools which has been filed with the Court in support of the Act's constitutionality.*

Respectfully submitted,

/s/ JOHN M. ELLIOTT

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* See Docket Number 26 of the Docket Entries in the United States District Court for the Eastern District of Pennsylvania.

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EXHIBIT B

1. *The significant and unique role of independent education.*

> "I believe that the independent preparatory schools have a significant role in American education. Nothing has helped the independent schools more than the fact they have produced so many national leaders who saw beyond the horizon of their own life. The careers of such men have done more than anything else to make our democracy accept the value of the independent schools."
>
> John F. Kennedy, President of the United States of America in address to Choate School, Wallingford, Connecticut in 1963.

Not only has independent education made a significant contribution to the national interest in contributing vast numbers of well educated, highly motivated leaders in business, the professions and public service,[1] but independent education because of its greater freedom from governmental and bureaucratic controls has been freer to experiment and innovate in new methods and areas of education.

Its successes have provided leadership and healthy competition for public education and vice versa. Each in a sense complements the other and gains strength from the interaction between the two.

Harold W. Dodds, former President of Princeton University, has made an eloquent statement on the case

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1. We would submit that it is not just accident that two of the most imaginative and visionary leaders in government of this century were products of the independent secondary school system —Franklin Delano Roosevelt and John F. Kennedy.

for independent education.[2] Stressing its primary function as the preservation of freedom, he stated:

> "Although today the independent schools educate but a small fraction of our youth of pre-college age, my belief that they must survive and prosper roots in a general political philosophy about freedom in general; particularly in what such schools contribute to freedom as well as to education. It is no shock to remind you that the last generation has been featured by a great expansion in the size and scope of government all over the world."

Dr. Dodds' emphasis on the public interest, which we as a people have in the healthy survival of the independent school as a leader and as a yardstick against which may be measured the quality of public education, is particularly germane:

> "Therefore, one chief reason that the independent schools must prosper exists in the freedom they have to concentrate on a mental muscle—stretching education for those able to receive it, to uphold the banner of the well-educated mind in a sound personality and a sound body.
>
> "Remember that the independent schools, as they honestly strive for excellence, influence the public school system by inspiring a spirit of emulation, as the private university has inspired the state university, a proposition with which most presidents of state universities will agree.
>
> "On the other hand, the public schools, particularly when they are good, afford healthy competition for the independent schools and remind the latter of

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2. Speech delivered at Springside School, Philadelphia, on April 2, 1964—reported in *Springside Briefs*, Volume 1, Issue No. 5, page 1.

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their constant obligation to serve our democracy well, and not merely a particular segment of our population."

The United States Commissioner of Education, Harold Howe, II, in an address to the National Association of Independent Schools, on March 4, 1967, said:

> "You [independent schools] can experiment with new course offerings that would arouse strong resistance if put forward by the public schools. As an example, I think independent schools have taken a commendable step forward with their decision to introduce major programs of sex education. Your independence, then, gives you the freedom to shape an educational experience which is often superior to that available in many public school systems.[3]

See also, "Message From President Nixon on Education Reform to the Congress - March 3, 1970", discussed at pp. 58-59 of Exhibit B.

2. *The case for pluralism in our society.*

Independent schools also preserve and further our nation's commitment to a general philosophy of pluralism which is essential to the preservation of freedom in a democratic society.

From the early days of the Republic, Americans have formed private associations for myriad purposes. These associations have been the well-springs for creativity in our society and have preserved our commitment to pluralism and equality.

John W. Gardner, former Secretary of Health, Education and Welfare has more recently, in a stirring article

3. The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results. 91st Congress, 2d Session, House of Representatives Document No. 91-267.

entitled "What Kind of Society Do We Want?" (*Readers Digest*, Sept. 1969), emphasized the danger of too much reliance on public institutions.

Commenting on the qualities a society needs for self-renewal, he states: "First of all, it would be characterized by pluralism, by variety, alternatives, choices and multiple foci of power and initiative."

Later, he too stresses the role of education:

> "The society capable of continuous renewal will be one that develops to the fullest its human resources, that removes obstacles to individual fulfillment, that emphasizes education, life long learning and self discovery."

Dr. Dodds, in his address, points out that our freedom in education, as in other areas, depends on a pluralistic society, opposed to an all embracing monolithic structure. Stressing the importance of healthy competition with government, he stated:

> "Nothing is clearer to me than the principle, enunciated by Lord Acton, that liberty is possible only in a society in which there are strong voluntary and independent centers of action and opinion outside of government. No matter how honest, well-intended and expert our government official may be, we cannot resign our civic and social responsibilities to any political body or to any autocracy of administrative experts, even experts in education. The notion that they are in a better position than the people generally to make basic public decisions for us, or to administer them when made except under popular controls, is an egregious myth."

But Dr. Dodds in his address also points out, that to be effective, the competition must excel—and this costs money:

> "Most decidedly the case for the independent schools is not to be found simply in the opportunity

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which they enjoy to be independent; they will be judged in the last analysis by what they do with their independence. They achieve their basic purpose only as they achieve excellence. And excellence in any line, including education, costs money and the money must come from the pocketbooks of individuals who are already paying taxes to support public education."

At this point, it should be observed that the Pennsylvania tuition reimbursement program which gives the money to the parent—and not the school—will promote greater competition and freedom for all educational institutions. For now the parent of the public school child has been given additional leverage (i.e., a measure of greater economic freedom to enroll his child in a nonpublic tuition school) to insist upon better quality in the public school system. And conversely competition will be increased among nonpublic schools, where here again the parent has greater leverage because he by his choice of schools has control over whether his share of the public funds will ever get to a particular school.

3. *The financial crisis facing independent secondary education.*

It is a matter of common knowledge of which this Court may take judicial notice that independent and all nonpublic schools are now facing a grave economic crisis which is exacerbated by current inflationary trends in the nation's economy.

Faced with spiralling costs, they are being forced to boost tuitions to such a level that would inevitably price these schools into practical extinction.[4]

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4. In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools. Message of the President on Education Reform, *supra*.

In order to preserve its scholarship programs and its general philosophy of serving a wide social and economic cross-section of the community, the independent school must be able to charge tuitions commensurate with their expenses. And unless some way can be found to ease the financial burden on parents, more and more students will drop out, thereby making it increasingly expensive for those that remain—and the transfer to the public system will add an intolerable burden on an already overburdened system.

Theodore R. Sizer, Dean of The Harvard Graduate School of Education has stressed the acute financial crisis facing nonpublic schools and the risk spiralling costs could have on scholarship aid to provide a varied student body. He said:[5]

> "How to finance this necessary and responsible increased cost? In my judgment the average independent school will not be able to increase its income the requisite amount and still hold tuition down low enough to provide for a varied student body. The only recourse is public funds, and I am prepared to argue that support of private education is in the public interest. Public education needs competition the pace setting and goading which strong independent schools might provide."[6]

Speaking on the importance of public funds to aid private education, United States Commissioner of Education Harold Howe said on the same date:

> "We will see more, rather than less, Federal aid to education in the years ahead for two reasons:
>
> First, the Congress knows that State and local funds alone cannot buy the kind of education we need

5. Address before the Teacher Training Section of the National Association of Independent Schools, March 4, 1967.
6. Independent School Bulletin, May 1967, 19, 21.

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to prepare students for a technological society and for a world beyond our shores that is infinitely more complex today than it was two decades ago.

Second, a genuinely democratic society cannot tolerate the inequitable distribution of quality that characterizes our State education system."[7]

A. *Relief of public burden*

That nonpublic education relieves the taxpayer of a very substantial financial burden is a fact not subject to question. This is borne out by Legislative Finding 4. to the Pennsylvania Act now under attack, which reads as follows:

"(4) Should parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State. Without allowance for inflationary increase, the annual operating cost of educating in public schools the five hundred thousand students now enrolled in Pennsylvania's nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). Any substantial portion of these operating and capital costs would be an intolerable public burden and present standards of public education would be seriously jeopardized. Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth."

It takes few calculations to demonstrate the extent of the tremendous financial burden, both as to annual operat-

7. Independent School Bulletin, May 1967 at 17.

ing expenses and capital expenditures for physical plant, that would be thrust on the taxpayers if it were not for the nonpublic schools.

Out of the total annual expenditure of $1,629 billion dollars by the Commonwealth and nonpublic schools for all elementary and secondary education in 1967, $400 million represented the value of the contribution for nonpublic schools.[8]

Estimates on the capital costs of building new facilities to accommodate the additional pupils now in nonpublic schools could run as high as $1.2 billion.[9]

And in President Nixon's report to the Congress of March 3, 1970, on Education Reform, he stated:

> "(f) Non-Public Schools.—The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our public school system. The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results."
>
> "Should any single school system—public or private—ever acquire a complete monopoly over the

8. This figure was determined by multiplying the estimated cost per pupil ($637) by the number of students (627,000).

Source: Statistics of Public, Elementary and Secondary Schools—U.S. Department of Health, Education and Welfare, Fall, 1967. Table 12, p. 26; and see "Public School Financial Statistics Report 1967-68" Vol. 8, No. 7, 1969, p. 2.

9. This additional capital cost is computed by multiplying the estimated capital cost per student ($2,000) by the number of students (627,000).

Source: "An appraisal of the Pennsylvania School Subsidy System" (prepared for the Superintendent of Pa. Dept. of Public Instruction by the State Division of the Pa. Economy League, Inc., July 1968, p. 6).

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education of our children, the absence of competition would neither be good for that school system nor good for the country. The nonpublic schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wide range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans."

"Up to now, we have failed to consider the consequences of declining enrollments in private elementary and secondary schools, most of them church supported, which educate 11% of all pupils—close to six million school children. In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools."

"If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970's would exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities."

"There is another equally important consideration: these schools—non-sectarian, Catholic, Protestant, Jewish and other—often add a dimension of spiritual value giving children a moral code by which to live. This government cannot be indifferent to the potential collapse of such schools."

EXHIBIT C

STATE PROGRAMS FOR ASSISTANCE TO NONPUBLIC SCHOOLS—1973[1]

	Purchase of Services		Textbook Aid		Tax Credits		Tuition Grants		Health & Welfare Services		Busing	
	Enacted	Proposed*	Enacted	Proposed*	Enacted	Proposed*	Enacted	Proposed*	Enacted	Proposed*	Enacted	Proposed*
Alaska	X											
Calif.			X		X			X			X	
Conn.							X		X		X	
Delaware									X		X	
District of Columbia											X	
Hawaii					X							
Illinois			X				X[2]		X		X	
Indiana			X			X						
Iowa			X						X			
Kansas						X					X	
Kentucky											X	
Louisiana			X		X		X				X	
Maine	X								X		X	
Mass.				X						X	X	
Michigan									X		X	
Minnesota					X						X	
Mississippi			X									
Missouri			X						X			
Nebraska			X									
Nevada									X			
N. Hampshire									X		X	
New Jersey			X								X	
New Mexico			X								X	
New York	X[3]		X		X[4]		X[4]		X		X	
N. Dakota											X	
Ohio			X		X[5]		X[6]		X		X	
Oregon											X	
Penn.			X				X[7]		X		X	
Rhode Island			X						X		X	
S. Dakota	X					X			X		X	
Vermont	X[8]								X		X	
W. Va.	X										X	
Wisconsin						X					X	

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* As used in this table, a proposed plan indicates a plan which has been introduced in the legislature or advocated by a responsible governmental authority.

1. Based on reports by the National Catholic Educational Association, "State Aid to Nonpublic Schools as of September 1, 1972" and "State Aid to Nonpublic Education as of February 1, 1973."

2. The Illinois bill was held not consistent with recent U. S. Supreme Court decisions by the Cook County Circuit Court. The decision is being appealed to the Illinois Supreme Court.

3. The Mandated Services Act of 1970 was ruled unconstitutional in April 1972 by a three-judge Federal District Court. The U. S. Supreme Court has noted probable jurisdiction. *Levitt v. Committee for Public Education and Religious Liberty* (October Term, 1972, Nos. 72-269, 72-270, and 72-271).

4. The New York Act was ruled unconstitutional in Federal District Court, The U.S. Supreme Court has noted probable jurisdiction. *Nyquist et al. v. Committee for Public Education and Religious Liberty* (October Term, 1972, Nos. 72-694, 72-753, 72-791 and 72-929).

5. The Ohio bill was held unconstitutional in Federal District Court, and appeal will probably be made to the U. S. Supreme Court.

6. The Ohio bill was ruled unconstitutional in Federal District Court in 1972, and was refused a hearing by the U. S. Supreme Court. *Essex v. Wolman* (No. 71-1664, October 10, 1972).

7. The Pennsylvania bill was declared unconstitutional in Federal District Court in 1972; the U. S. Supreme Court noted probable jurisdiction, *Sloan v. Lemon, Crouter v. Lemon,* (October Term, 1972, Nos. 72-429 and 72-620).

8. A 1971 Vermont aid law was ruled unconstitutional by the U. S. District Court in March of 1972.

NOTE:

Ohio and California provide for aid to nonpublic school children for vocational education. Mississippi provides for financial assistance up to $240 annually for nonpublic school pupils with learning disabilities. New York makes provision for assistance to handicapped children, as well as some salary aid to teachers in private orphanages. North Dakota permits lay teachers in nonpublic schools to participate in the public school teacher retirement program and exempts nonpublic schools from state sales tax for certain items. Oregon and Washington allow nonpublic schools to use the public school central purchasing agency.